IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-.....

76-1620

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York,

Petitioner,

against

HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Superintendent of Insurance of the State of New York, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered herein on February 18, 1977.

Opinions Below

The decision for the Court of Appeals was rendered without opinion and is not yet reported. A copy of that Court's order of affirmance is appended hereto at page 1a.*

* Numbers in parentheses followed by "a" refer to pages of the appendix hereto.

In announcing its decision, the presiding judge stated that the Court was affirming upon the opinion of the District Court for the Southern District Court for the Southern District of New York. The District Court opinion is reported at 414 F. Supp. 473 and is appended at page 3a. The judgment of the District Court is appended at page 8a.

Jurisdiction

The judgment of the Court of Appeals was rendered and entered on February 18, 1977. The jurisdiction of this Court to review that judgment rests on 28 U.S.C. § 1254(1).

Question Presented

Whether ERISA § 514 precluded the New York State Insurance Department from inquiring on behalf of a beneficiary of the respondent-trustees' pension fund regarding credits claimed to have been earned prior to January 1, 1975 and, if necessary, take action against them under N.Y. Insurance Law, Art. 3-A?

Statute Construed

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. et seq., provides in pertinent part:

> § 514(a) [29 U.S.C. § 1144(a)] "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975."
>
> § 514(b) [29 U.S.C. § 1144(b)] "(1) This section shall not apply with respect to any cause of action which

> arose, or any act or omission which occurred before January 1, 1975."
>
> "(2) (A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."
>
> (B) "Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate companies, insurance contracts, banks, trust companies, or investment companies."

Statement of the Case

Petitioner seeks review of a judgment of the Court of Appeals for the Second Circuit (1a) which affirmed a judgment of the District Court, Southern District of New York (Hon. Charles M. Metzner, J.) entered July 16, 1976. The District Court declared that the New York State Insurance Department was preempted by Section 514 of ERISA from assuming any jurisdiction over an inquiry dated March 24, 1975, by a beneficiary of respondents' pension fund concerning pension credits claimed to have been earned prior to January 1, 1975. It also enjoined the Insurance Department from further pursuit of this inquiry and from the institution of any civil or criminal proceeding arising therefrom (9a).

This action arose out of an attempt by the New York State Insurance Department, acting under N.Y. Insurance Law, Art. 3-A, to answer an inquiry by a member of re-

spondents' fund who desired information as to whether he should have been credited with a year's employment while a member of another teamsters local union.

Unfortunately, respondent-trustees' response to the Insurance Department's inquiries was an obstinate refusal to cooperate or to assist its member. Claiming that the Insurance Department lacked jurisdiction because of a pre-emption by ERISA § 514, the respondents instituted the present action.

The State did not deny that ERISA prempts it as to any matters arising after January 1, 1975. Rather the dispute concerns the scope of the State's residual jurisdiction over pension funds.

The District Court held that this residual jurisdiction could not be based solely upon the fact that pension credits were accumulated prior to January 1, 1975; that in the instant case, there had been no showing of an act or omission occurring prior to January 1, 1975, but that, in the District Court's view, the Insurance Department was attempting to investigate the present status of the complainant (7a). Noting that ERISA provided for uniform, comprehensive federal supervision of pension funds and for remedies to protect beneficiaries aggrieved by acts of the funds' trustees, the Court held that allowing State jurisdiction would create confusion in this area of the law and defeat the purpose of the Federal statute (6-8a).

The Court of Appeals affirmed on the opinion of the District Court (1-2a).

Reasons for Granting the Writ

I

In holding that petitioner was pre-empted by ERISA from investigating a pension fund complaint lodged after January 1, 1975 even though it related to matters which oc-

curred prior thereto, the courts below have decided an important question of law which has not been, but should be, decided by this Court.

This interpretation of ERISA's pre-emption and residual jurisdiction clauses (§ 514; 29 U.S.C. § 1144) violates, in petitioner's view, the national policy which reserves the regulation of insurance to the States as well as misinterprets those provisions of the statute. Congress has reserved to the states the regulation of the insurance industry, see McCarran-Ferguson Act, PL 15, 59 Stat 33-34 (1945) which overruled this Court's decision in *United States* v. *Southeastern Underwriters Ass'n*, 322 U.S. 533 (1944). This policy is carried into ERISA, itself, see § 514(b) (2) (A) (B). In view of the expressed intent of Congress, the lower courts should not have taken upon themselves to oust the State of New York from its long-established role as a protector of pension and welfare fund beneficiaries, which, even after ERISA, remains intact within the relatively narrow time frame preserved by Congress, § 514(b) (1); Cf. *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973). Yet this is precisely what occurred.

A careful examination of the District Court's opinion shows it to be founded upon a *non sequitur*: that the undisputed subject matter preemption of ERISA also prevents the states from acting upon all but those complaints alleging breaches of duty to a fund beneficiary occurring prior to January 1, 1975, that had been lodged with the State prior thereto. Not only is this logically fallacious, but legally erroneous as well.

Petitioner does not claim that the earning of pension credits constitutes a "cause of action" or "act or omission' within the meaning of § 514(b). It is a fund's breach of duty to a member owed benefits on account of such credit that gives rise to a cause of action and comes within the definition of an "act or omission."

In the instant case, it is not even clear whether the trustees' conduct has given rise to a cause of action by reason of their acts or omissions prior to January 1, 1975. However, their "stonewalling"; their obstinate refusal to give any information (as if they, in fact, had something to hide) makes such a determination impossible at this time. Of course, if the trustees had breached their duty, the ability of the Insurance Department to enforce N.Y. Insurance Law § 37-2(7) would not be without limit as the District Court opinion suggests (4, 7a). It would be subject to a six year statute of limitations, which, in the case of a claim sounding in fraud would be deemed to have occurred from the time when discovered or when it could have been discovered with reasonable diligence, NYCPLR § 213(1)(8). In *Runyon* v. *McCrary*, —— U.S. ——, 49 L. ed. 2d 415, 430-432 (1976) this Court held that specific state statutes of limitations for analagous causes of action were to be followed in federal cases under the Civil Rights Laws, e.g. 42 U.S.C. § 1983; thus insisting that state law be followed in determining when an action is deemed to have arisen and the period in which it may be prosecuted.

The rationale of avoiding subjecting fund trustees to more than one jurisdiction, so uncritically adopted by the lowers courts (5-7a) cannot be achieved in any event. Congress expressly reserved to the states their criminal law jurisdiction, ERISA § 514(b) (4), 29 U.S.C. § 1144(b) (4). Thus any breach of duty by the trustees constituting a crime (e.g. fraud, embezzlement) could still be prosecuted within the period of the Statute of Limitations, NYCPL § 30.10. Thus the provision of the final judgment prohibiting any criminal proceedings (9a) is erroneous on its face. Furthermore this jurisdiction would be frustrated if, as in the instant case, a state is prohibited from making a preliminary inquiry as to the facts.

II

What authority is available on the issue at bar supports the petitioner. The legislative history relied upon by respondents and the courts below, is inapposite, dealing as it does with the substance of the preemption rather than its temporal boundary. It is not disputed that ERISA was designed to achieve uniform regulation of pension plans. However, the Act on its face is prospective in its operation, leaving to the States control over anything occurring prior to January 1, 1975, even after that date. This is in accord with the standard principle of statutory construction which applies a statute prospectively absent a clear contrary intent, *Greene* v. *United States*, 376 U.S. 149 (1964).

This prospective operation of ERISA has been widely acknowledged by the Courts, even by the Second Circuit, *Nolan* v. *Meyer*, 520 F 2d 1276, 1278 F.n. 2 (2d Cir. 1975); yet the instant decision by another panel of the Court ignores this generally accepted rule, thus coming into conflict with the Ninth Circuit's view of residual state jurisdiction, see *Alvares* v. *Erickson*, 514 F 2d 156, 160-161 (9th Cir. 1975) and the views of other lower courts that have passed upon similar matters, *In re Somers*, 126 Cal. Rptr. 220, 224 (Cal. App. 1975), *Keller* v. *Graphic Systems of Akron*, 422 F. Supp. 1005, 1008 (N.D. Ohio 1976); *Anderson* v. *Abex Corp.*, 418 F. Supp. 5, 6 (D. Vt.) aff'd 539 F 2d 703 (2d Cir. 1976); and *Martin* v. *Bankers Trust Co.*, 417 F. Supp. 923 92 (W.D. Va. 1976).

CONCLUSION

Certiorari should be granted.

Dated: New York, New York, May 18, 1977.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A. HIRSHOWITZ
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APPENDIX

Judgment of Affirmance.

Filed February 18, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteen day of February, one thousand nine hundred and seventy-seven.

Present: HON. ROBERT P. ANDERSON
HON. WILLIAM H. TIMBERS, Circuit Judges
HON. LEE P. GAGLIARDI, District Judge

76-7329

HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund,

Plaintiffs-Appellees,

—against—

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Judgment of Affirmance.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

by
Vincent A. Carlin
Chief Deputy Clerk

Opinion of the District Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 3631
(CMM)

HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN CILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund,

Plaintiffs,

—against—

THOMAS A. HARNETT, as Superintendent of Insurance of the State of New York,

Defendant.

APPEARANCES

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James V. Morgan
Of Counsel

Louis J. Lefkowitz
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Assistant Attorney General
Of Counsel

Opinion of the District Court.

METZNER, D.J.:

Plaintiffs move for sumary judgment in this action for declaratory and injunctive relief. Plaintiffs, trustees of Bakery Drivers Local 802 Pension Fund, seek to enjoin defendant, Superintendent of Insurance of the State of New York, from pursuit of the department's inquiry into the pension benefit status of a pension fund participant. They also seek a declaration of their rights and obligations with respect to the subject matter of this action.

Plaintiffs have refused to supply the requested information on the ground that the jurisdiction of the New York State Insurance Department has been superceded in this matter by the United States Department of Labor by virtue of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* The act provides for exclusive federal jurisdiction in the area of employee benefit plans with an exception for "any cause of action which arose, or any act or omission which occurred before January 1, 1975." 29 U.S.C. § 1144.

Pursuant to a request by the pension fund participant on March 24, 1975, the Insurance Department inquired of the plaintiffs on April 25, 1975, as to the participant's pension benefit status. When plaintiffs asked the basis of jurisdiction for the department's inquiry, it asserted that inasmuch as most of the member's pension credits were earned prior to January 1, 1975, the New York State Insurance Department was not superceded in this matter by ERISA.

Plaintiffs continue to refuse to supply the requested information. They assert that the April 25, 1975 inquiry was the first occasion upon which they received notice of any possible controversy or dispute over the status of the pension fund member. Plaintiffs assert that if defendant prevails, the New York State Insurance Department would have continuing jurisdiction over claims by all employees who earned pension credits prior to January 1, 1975. Plaintiffs believe that they would then be subject to concurrent state and federal jurisdiction.

Opinion of the District Court.

No genuine issue of fact exists in this action. The question of whether a state may continue to exercise supervisory jurisdiction over a pension benefit plan is a question of law to be decided by reference to ERISA and to the legislative history of that act.

The relevant statute, Section 514 of ERISA, 29 U.S.C. § 1144, provides:

> "(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .
>
> "(b) (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975."

This legislative history of ERISA shows that Congress intended absolute preemption of the filed of employee benefit plans. In introducing the conference report on ERISA, Senator Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, said:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." [1974] U.S. Code Cong. & Admin. News 5188-89.

Preemption of the field was intended to provide for uniform regulation of employee benefit plans. The report of the House Education and Labor Committee states:

> "Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports." [1974] U.S. Code Cong. & Admin. News 4655.

The purpose of ERISA was to provide for federal regulation of the field with a limited exception to permit an orderly transition from state to federal regulation of employee benefit plans by permitting state agencies to dispose of matters pending before them prior to the effective date of the new law.

ERISA offers full protection to the employee involved in this matter. The act provides that the administrator of an employee pension benefit plan must furnish to any participant or beneficiary who so requests a statement of his current status which includes the total benefits accrued. 29 U.S.C. § 1025. The Secretary of Labor, as well as participants and beneficiaries, are empowered to bring suit upon a violation of this reporting requirement. 29 U.S.C. § 1132(a) (3), (5). A participant or beneficiary may bring suit to recover benefits due to his under the terms of his plan or to enforce his rights under the terms of the plan. 29 U.S.C. § 1132(a)(1)(B). The Secretary of Labor has power to investigate in order to determine whether a violation of the act has occurred. 29 U.S.C. § 1134.

Section 1144(b)(1) is obviously not intended to permit continuing state regulation and investigation based solely upon the fact that pension credits were accumulated prior to January 1, 1975. A contrary result would create a chaotic condition in this field and violate the whole purpose of ERISA.

There is no cause of action existing prior to January 1, 1975 involved in this case. There is no showing of an act or omission by plaintiffs with respect to the Pension Fund member prior to that date. The Insurance Department was seeking to investigate the *present status* of the member who wished to know if he is now credited by his pension plan for a year's employment with another Teamsters' Union as well as for his employment with the Bakery Drivers Union.

In order to prevent this contravention of the purpose of ERISA, the exception to federal regulation provided in Section 1144(b)(1) must be narrowly construed to limit state regulation to what is essentially a cleanup role, that is, to the disposition of causes of action and disputes with respect to employee benefit plans existing before January 1, 1975.

Summary judgment is entered for plaintiffs.

So ordered.

Dated: New York, New York
June 3, 1976

/s/ Charles M. Metzner
U.S.D.J.

Judgment of the District Court.

Filed July 16, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 3631 (CIM)

HAROLD D. AZZARO, SAMUEL GALLO, GERALD HANDLEY, SAMUEL RUBIN, BEN GILIBERTO and JACK SCHUMAN, as Trustees of Bakery Drivers Local 802 Pension Fund,

Plaintiffs,

against

THOMAS A. HARNETT, as Superintendent of Insurance of Insurance of the State of New York,

Defendant.

Plaintiffs, by their attorneys, Cohen, Weiss and Simon, having moved this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(g) of this Court, and said motion having come on to be heard before the Honorable Charles M. Metzner, United States District Judge, on the 20th day of May, 1976.

Now, upon reading and filing the summons dated July 24, 1975, the complaint dated July 24, 1975 and the exhibits annexed thereto; plaintiffs' notice of motion dated January 16, 1976; plaintiffs' statement pursuant to Rule 9(g) of the rules of this Court, the affidavit of Samuel J. Cohen, sworn to the 5th day of January, 1976 and the exhibits annexed thereto; the affidavit of Joan Norton, sworn to the 18th day of December, 1975 and the exhibits annexed thereto; the affidavit of James V. Morgan, sworn to the 14th day of

Judgment of the District Court.

April, 1976; plaintiffs' memorandum dated January 15, 1976; plaintiffs' reply memorandum dated April 14, 1976 all in support of said motion; and upon defendant's answer dated September 22, 1975; defendant's statement pursuant to Rule 9(g) of this Court dated March 26, 1976 and the exhibits annexed thereto and defendant's memorandum of law in opposition to plaintiffs' motion for summary judgment dated March 26, 1976 all in opposition to said motion; and having heard Samuel J. Cohen, of counsel for Cohen, Weiss and Simon, attorneys for plaintiffs, and Robert S. Hammer, Assistant Attorney General of the State of New York, of counsel for Louis J. Lefkowitz, Attorney General of the State of New York, on behalf of defendant, and due deliberation having been had thereon; and having read and filed the opinion of this Court dated June 4, 1976; it is upon motion of Cohen, Weiss and Simon, attorneys for plaintiffs,

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for summary judgment is granted in all respects and it is further

ORDERED, ADJUDGED AND DECREED that defendant Thomas A. Harnett, as Superintendent of Insurance of the State of New York, and all persons acting under his authority, direction or control, be and hereby are enjoined from instituting or maintaining any criminal prosecution or any civil action or proceeding against the plaintiffs by reason of any alleged violation of the Insurance Law of the State of New York pertaining to Seymour Eskowitz.

Dated New York, New York
July 15, 1976

CHARLES M. METZNER
United States District Judge

Judgment Entered: 7/16/76
RAYMOND F. BURGHARDT
Clerk